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No. 90-1748

In the Supreme Court of the United States

OCTOBER TERM, 1990

JERRY R. WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether an indictment alleging that an employee caused his employer to maintain on file a false Form W-4 charges a willful attempt to evade or defeat tax in violation of 26 U.S.C. 7201.

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OPINION BELOW

The decision of the court of appeals, Pet. App. 5a–15a, is reported at 928 F.2d 145.

JURISDICTION

The judgment of the court of appeals, Pet. App. 16a, was entered on March 27, 1991. The petition for a writ of certiorari was filed on May 13, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On December 6, 1989, a grand jury returned a three-count indictment charging petitioner with willfully attempting to evade and defeat income taxes owing for 1983, 1984, and 1985, in violation of 26 U.S.C. 7201. Following a jury trial in the United States District Court

for the Western District of Texas, petitioner was convicted on all three counts. The district court sentenced petitioner to two concurrent three-year terms of imprisonment on Counts 1 and 2, a consecutive suspended three-year term of imprisonment and five years of probation on Count 3, and a $10,000 fine. Pet. App. 7a.

1. Great American Reserve Life Insurance Company (GARCO) employed petitioner as an insurance executive from 1971 through 1985. Until late 1982, petitioner maintained in GARCO's files a Form W-4 claiming one exemption. Although GARCO withheld taxes from petitioner's compensation, petitioner did not file any federal income tax returns. Pet. 5; Pet. App. 6a.

In 1982, petitioner was promoted and transferred to San Antonio, Texas. In October 1982, petitioner—anticipating additional deductions from increased business expenses and interest expenses on a mortgage on a new home—filed a new Form W-4 claiming 14 exemptions. Subsequently, petitioner filed a Form W-4 claiming 35 exemptions. On March 17, 1983, he filed a third Form W-4, claiming 50 exemptions. In a note included with the last form, he advised the GARCO accounting office: "I'm going to have to increase my exemption to 50 for a few months. I've got to survive the tax bite until my o/w build up." The "o/w" referred to "overwrites," the payments petitioner received based on insurance policies written by his agents. Pet. 5; Pet. App. 6a.

Acting on the W-4 Forms, GARCO withheld only negligible amounts from petitioner's compensation for 1983, 1984, and 1985. The amounts withheld ranged from slightly more than $1200 on compensation of more than $61,000 to $5455 on compensation of more than $74,600. Pet. App. 6a.

2. At the close of the government's case, petitioner moved for a judgment of acquittal on Counts 2 and 3. He argued that those counts did not charge a violation of 26 U.S.C. 7201 because neither alleged an affirmative act of attempted evasion as required by *Spies* v. *United*

States, 317 U.S. 492 (1943). Pet. 5. The government argued that both counts alleged the affirmative act of "maintaining of record with his employer his claim on Form W-4 of 50 exemptions." *Ibid.* The district court denied petitioner's motion. *Id.* at 6. In addition, the court instructed the jury that the government must prove "that the Defendant made an affirmative attempt to evade or defeat an income tax." 6 Tr. 52. The jury found petitioner guilty on all counts of the indictment, and the court denied petitioner's post-trial motion for acquittal based on the indictment's asserted failure to charge an affirmative act. Pet. 6–7.

3. The court of appeals affirmed. Petitioner renewed his contention that his convictions on Counts 2 and 3 should be reversed because the indictment did not allege an affirmative act of attempted evasion. Pet. App. 7a. In light of petitioner's concession that filing the fraudulent Form W-4 claiming 50 deductions on March 17, 1983, was an affirmative act for that tax year, the court of appeals dismissed as "semantic legerdemain" his argument that maintaining the fraudulent form in effect for the 1984 and 1985 tax years was only a non-felonious omission. *Id.* at 11a. The court reasoned that petitioner had an "obligation to correct his intentional misrepresentations" and that "[b]y maintaining the false form on file [petitioner] continued to perpetrate his initially-intended misrepresentations which were vitally relevant to the tax issue" and "thus constituted an act 'the likely effect of which was to mislead or conceal.' " *Id.* at 13a.

ARGUMENT

Petitioner contends that the indictment is defective because it did not charge an affirmative act of attempted tax evasion. Pet. 8 & n.6. His contention rests on *Spies* v. *United States*, 317 U.S. 492 (1943).

In *Spies*, this Court reversed a conviction for attempted tax evasion because the trial court had "refused a request to instruct the jury that an affirmative act was necessary to constitute a willful attempt."

317 U.S. at 494. The Court reasoned that Congress, by "employing the terminology of attempt" in the felony defined by 26 U.S.C. 7201, "intended some willful commission in addition to the willful omissions that make up the list of misdemeanors" in 26 U.S.C. 7203. 317 U.S. at 499. Noting that Congress had declined to "define or limit the methods by which a willful attempt to defeat and evade might be accomplished," the Court held that the requirement of an affirmative act is satisfied by any attempt "to evade tax in any manner or to defeat it by any means." *Ibid.* "By way of illustration, and not by way of limitation," the Court listed numerous types of conduct from which an "affirmative willful attempt may be inferred," including "any conduct, the likely effect of which would be to mislead or to conceal." *Ibid.* Applying that standard to the case before it, the Court reversed the taxpayer's conviction because of the defective jury instruction. At the same time, the Court stated that it "would consider conviction of a felony sustainable" on retrial based on the government's evidence showing, *inter alia*, that the taxpayer "kept inadequate and misleading records." *Id.* at 500.

The allegations in Counts 2 and 3 of the indictment in this case satisfied the requirements of *Spies*. Those counts alleged that petitioner willfully attempted to evade income tax by, *inter alia*, "maintaining of record with his employer his claim on Form W-4 of 50 exemptions." Pet. App. 3a. Contrary to petitioner's contention, Pet. 8, "maintaining" a fraudulent form on file with one's employer is not necessarily the product of inaction. Since an employee can take affirmative acts to cause his employer to maintain a false Form W-4 in effect, the indictment plainly did not rest its charge of attempted tax evasion on a passive omission.[1]

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[1] Petitioner does not claim in this Court that the evidence was insufficient to establish an affirmative act constituting an attempt to evade income taxes. The district court instructed the jury that the government must prove "that the Defendant made an affirmative attempt to evade or defeat an income tax." 6 Tr.

Petitioner contends that if the indictment against him is sufficient, an employee who willfully fails to amend an initially correct Form W-4 in response to changed circumstances could be charged with attempted tax evasion. Pet. 10. The court of appeals' decision would not permit that result, however, because it requires submission of a Form W-4 that is false at the time of filing, and maintenance of that form on file. Thus, in rejecting petitioner's challenge to the indictment, the court stated that petitioner "was under a continuing obligation to correct his intentional misrepresentations" and that he "continued to perpetrate his initially-intended misrepresentations." Pet. App. 13a. The court did not suggest that failure to correct a Form W-4 that was not initially intended to mislead would constitute an affirmative act of evasion.[2]

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52. The evidence introduced by the government at trial was sufficient for the jury to conclude that petitioner's maintenance of the false Form W-4 on file constituted an affirmative act of attempted evasion, for two reasons. First, petitioner willfully filed the false Form W-4 in 1983 with the result that insufficient tax was withheld from his compensation in 1984 and 1985. Second, petitioner engaged in affirmative acts to maintain the false Form W-4 in effect after 1983 by, for example, lying to an internal revenue agent. Gov't C.A. Br. 12–13; 4 Tr. 101, 103.

The court of appeals was entirely correct in concluding that "[b]y maintaining the false form on file [petitioner] continued to perpetrate his initially-intended misrepresentations." Pet. App. 13a. Petitioner's maintaining the false Form W-4 on file was tantamount to communicating to his employer that he was entitled to 50 exemptions during 1984 and 1985 and that it was appropriate to continue withholding from his compensation at the same rate. The effect of petitioner's conduct was to mislead the government about his tax liability.

[2] The court of appeals further observed that a taxpayer could not be convicted of attempting to evade tax in the absence of a specific intent to evade. Pet. App. 8a. In practice, a taxpayer's failure to amend an initially correct Form W-4 could not be charged as tax evasion unless the government had evidence that the taxpayer intended to evade his taxes through what was, in substance, a false representation.

Finally, contrary to petitioner's contention, Pet. 10, the court of appeals' rationale would not sustain a felony conviction for attempted tax evasion based on the intentional failure to file a tax return or to pay a tax. The court of appeals expressly acknowledged the *Spies* distinction between the felony of attempted evasion of tax, which involves conduct the likely effect of which is to conceal or mislead, and the misdemeanor of failure to file a tax return, which does not require proof of that element. Pet. App. 8a–9a. The court's decision turns on conduct that amounted to reassertion of false representations that petitioner was entitled to a certain number of exemptions and that he anticipated having a tax liability of an amount approximately equivalent to the amount withheld. Thus, in accord with *Spies*, the decision required more than a mere passive failure to file a return or pay taxes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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